

In the Supreme Court of Iowa

**Supreme Court No. 17-1415
Grievance Commission No. 836**

**Iowa Supreme Court
Attorney Disciplinary Board,**

Appellee,

vs.

Sean Joseph Barry,

Appellant

**Appeal from the Report of the
Iowa Supreme Court Grievance Commission**

Appellee's Final Brief

**Iowa Supreme Court
Attorney Disciplinary Board
Susan Wendel, AT0008445
Iowa Judicial Branch Building
1111 E. Court Avenue
Des Moines, IA 50319-5003
Telephone: (515) 725-8017
Fax: (515) 725-8013
E-mail: susan.wendel@iowacourts.gov**

Attorney for Appellee

TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	7
ROUTING STATEMENT.....	9
STATEMENT OF THE CASE	9
STATEMENT OF THE FACTS	11
ETHICAL VIOLATIONS	18
ARGUMENT.....	37
I. WHETHER THE COMMISSION’S RECOMMENDATION, THAT BARRY BE SUSPENDED FOR A PERIOD OF EIGHTEEN MONTHS, IS AN EXCESSIVE SANCTION?	37
A. Preservation, Scope and Standard of Review	37
B. The Commission’s Sanction Recommendation is Not Excessive.....	37
CONCLUSION.....	52
CONDITIONAL REQUEST FOR ORAL SUBMISSION.....	53
COMPLIANCE CERTIFICATE.....	54
COST CERTIFICATE.....	54
CERTIFICATE OF FILING AND PROOF OF SERVICE.....	54

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>Comm. on Prof'l Ethics and Conduct v. Bauerle</i> , 460 N.W.2d 452 (Iowa 1990)	31, 45, 46
<i>In the Matter of Rickabaugh</i> , 661 N.W.2d 130 (Iowa 2003)	39, 42, 43, 46
<i>Iowa Sup. Ct. Atty. Disc. Bd. v. Dolezal</i> , 841 N.W.2d 114 (Iowa 2013)	36
<i>Iowa Sup. Ct. Atty. Disc. Bd. v. Gailey</i> , 790 N.W.2d 801 (Iowa 2010)	12
<i>Iowa Sup. Ct. Atty. Disc. Bd. v. Kallsen</i> , 814 NW.2d 233 (Iowa 2012)	34
<i>Iowa Sup. Ct. Atty. Disc. Bd. v. Khowassah</i> , 837 N.W.2d 649 (Iowa 2013)	47
<i>Iowa Sup. Ct. Atty. Disc. Bd. v. Kingery</i> , 871 N.W.2d 109 (Iowa 2015)	21
<i>Iowa Sup. Ct. Atty. Disc. Bd. v. Lustgraaf</i> , 792 N.W.2d 295 (Iowa 2010)	31, 32
<i>Iowa Sup. Ct. Atty. Disc. Bd. v. McGinness</i> , 844 N.W.2d 456 (Iowa 2014)	33, 34, 35, 38, 39, 40, 47
<i>Iowa Sup. Ct. Atty. Disc. Bd. v. Nelson</i> , 838 N.W.2d 528 (Iowa 2013)	12, 21
<i>Iowa Sup. Ct. Atty. Disc. Bd. v. Qualley</i> , 828 N.W.2d 282 (Iowa 2013)	25
<i>Iowa Sup. Ct. Atty. Disc. Bd. v. Rhinehart</i> , 827 N.W.2d 169 (Iowa 2013)	36

<i>Iowa Sup. Ct. Atty. Disc. Bd. v. Silich,</i> 872 N.W.2d 181 (Iowa 2015)	23
<i>Iowa Sup. Ct. Atty. Disc. Bd. v. Stoller,</i> 879 N.W.2d 199 (Iowa 2016)	25
<i>Iowa Sup. Ct. Atty. Disc. Bd. v. Stowe,</i> 830 N.W.2d 737 (Iowa 2013)	12
<i>Iowa Sup. Ct. Atty. Disc. Bd. vs. Taylor,</i> 887 N.W.2d 369 (Iowa 2016)	32, 33, 38, 43, 46, 49, 51
<i>Iowa Sup. Ct. Atty. Disc. Bd. v. Templeton,</i> 784 N.W.2d 761 (Iowa 2010)	36
<i>Iowa Sup. Ct. Atty. Disc. Bd. v. Thompson,</i> 732 N.W.2d 865 (Iowa 2007)	31, 33, 37, 39, 40, 41, 46, 50
<i>Iowa Sup. Ct. Atty. Disc. Bd. v. Van Ginkel,</i> 809 N.W. 2d 96 Iowa (2012)	39
<i>Iowa Sup. Ct. Atty. Disc. Bd. v. Weiland,</i> 885 N.W.2d 198 (Iowa 2016)	20, 21, 22, 23, 24, 25
<i>Iowa Sup. Ct. Bd. of Prof. Ethics & Conduct v. Bell,</i> 650 N.W.2d 648 (Iowa 2002)	31, 32, 38, 43, 45
<i>Iowa Sup. Ct. Bd. of Prof. Ethics & Conduct v. Grotewold,</i> 642 N.W. 2d 288 (Iowa 2002)	50
<i>Iowa Sup. Ct. Bd. of Prof. Ethics & Conduct v. Rylaarsdam,</i> 636 N.W.2d 90 (Iowa 2001)	45
<i>Iowa Sup. Ct. Bd. of Prof. Ethics & Conduct v. Stein,</i> 586 N.W.2d 523 (Iowa 1998)	40
<i>Iowa Sup. Ct. Bd. of Prof. Ethics & Conduct v. Stowers,</i> 626 N.W.2d 130 (Iowa 2001)	45

Statutes:

Iowa Code Chapter 633B	13
Iowa Code Section 714.1(2)	32
Iowa Code Section 715A.1	28
Iowa Code Section 715A.2	28, 32, 33

Other Authorities:

Comments 1 and 4 to Iowa R. of Prof'l Conduct 32:1.4(a).....	22
Iowa Code of Prof'l Responsibility DR 1-102(A)(3)	32
Iowa Code of Prof'l Responsibility DR 1-102(A)(4)	32, 33
Iowa Code of Prof'l Responsibility DR 1-102(A)(5)	33
Iowa Code of Prof'l Responsibility DR 1-102(A)(6)	32, 33
Iowa R. of Prof'l Conduct 32:1.0	28
Iowa R. of Prof'l Conduct 32:1.3	9, 10, 18, 21, 22, 43, 46
Iowa R. of Prof'l Conduct 32:3.2	47
Iowa R. of Prof'l Conduct 32:1.4(a) (3).....	9, 10, 22, 43
Iowa R. of Prof'l Conduct 32:1.4(a) (4).....	9, 10, 22, 23, 43

Iowa R. of Prof'l Conduct 32:8.4(b)	9, 10, 27, 31, 32, 33, 43
Iowa R. of Prof'l Conduct 32:8.4(c).....	9, 10, 11, 24, 25, 33, 34, 35, 44
Iowa R. of Prof'l Conduct 32:8.4(d)	9, 11, 35, 44
Iowa R. App. P. 6.1101(2) (e)	9
Iowa R. Civ. P. 1.511	12
Iowa Ct. R. 34.23(1).....	44
Iowa Ct. R. 34.23(2).....	44
Iowa Ct. R. 36.19(1).....	37
Iowa Ct. R. 36.22(4).....	37
Iowa Ct. R. 39.7.....	18
Iowa Ct. R. 42.6.....	18

Statement of the Issues Presented for Review

The Commission's Recommendation that Barry be Suspended for a Period of Eighteen Months is not an Excessive Sanction

Cases:

Comm. on Prof. Ethics & Conduct of the Iowa State Bar Ass'n v. Bauerle, 460 N.W.2d 452 (Iowa 1990)

In the Matter of Rickabaugh,
661 N.W.2d 130 (Iowa 2003)

Iowa Sup. Ct. Atty. Disc. Bd. v. Khowassah,
837 N.W.2d 649 (Iowa 2013)

Iowa Sup. Ct. Atty. Disc. Bd. v. McGinness,
844 N.W.2d 456 (Iowa 2014)

Iowa Sup. Ct. Atty. Disc. Bd. v. Taylor,
887 N.W.2d 369 (Iowa 2016)

Iowa Sup. Ct. Atty. Disc. Bd. v. Thompson,
732 N.W.2d 865 (Iowa 2007)

Iowa Sup. Ct. Atty. Disc. Bd. v. Van Ginkel,
809 N.W.2d 96 (Iowa 2012)

Iowa Sup. Ct. Bd. of Prof. Ethics & Conduct v. Bell,
650 N.W.2d 648 (Iowa 2002)

Iowa Sup. Ct. Bd. of Prof. Ethics & Conduct v. Grotewold,
642 N.W.2d 288 (Iowa 2002)

Iowa Sup. Ct. Bd. of Prof. Ethics & Conduct v. Stein,
586 N.W.2d 523 (Iowa 1998)

Iowa Sup. Ct. Bd. of Prof. Ethics & Conduct v. Stowers,
626 N.W.2d 130 (Iowa 2001)

Iowa Sup. Ct. Bd. of Prof. Ethics & Conduct v. Rylaarsdam,
636 N.W.2d 90 (Iowa 2001)

Other Authorities:

Iowa Ct. R. 36.22(4)

Iowa R. of Prof'l Conduct 32:1.3

Iowa R. of Prof'l Conduct 32:3.2

Iowa Ct. R. 36.19(1)

Iowa Ct. R. 34.23(1)

Iowa Ct. R. 34.23(2)

ROUTING STATEMENT

The Iowa Supreme Court should retain this case because “[t]he Supreme Court shall ordinarily retain the following types of cases: ... e. Cases involving lawyer discipline.” Iowa R. App. P. 6.1101(2)(e).

STATEMENT OF THE CASE

Nature of the Case: On June 5, 2017, with the permission of the Grievance Commission, the Iowa Supreme Court Attorney Disciplinary Board (Board) filed an Amended and Substituted Complaint (Complaint) against Respondent (Barry), alleging lawyer misconduct in violation of Iowa Rules of Professional Conduct 32:1.3, 32:1.4(a)(3), 32:1.4(a)(4), 32:8.4(b), 32:8.4(c), and 32:8.4(d). (Am. App. p. 16; Am. App. pp. 17-24)

Course of Proceedings and Disposition: On June 27, 2017, Barry filed an Amended Answer (Answer) to the Board’s Amended and Substituted Complaint. Barry’s Answer admitted all allegations in the Complaint, with the exception of allegations in paragraphs 24, 25A, 25B, 26, and 31A. (Am. App. pp. 25-27) On June 30, 2017, the parties jointly stipulated to all of the allegations in the Complaint. (Am. App. pp. 29-36) On July 10, 2017, the Commission issued an Order (Order) accepting the parties’ waiver of formal hearing and stipulated submission of the case. The Order closed the record and established a 12 o’clock noon, July 21, 2017,

deadline for the parties' briefs regarding possible sanctions, and an August 11, 2017 deadline for the parties' proposed Findings of Fact. The Order continued the July 24, 2017 hearing, and set a conference call on that date for commission members to deliberate, regarding case disposition. (Am. App. p. 41)

On September 5, 2017, the Commission filed its Findings of Fact, Conclusions of Law, and Ruling. (Am. App. pp. 43-57) The Commission found, that by knowingly failing to timely file and serve his client's Petition for dissolution, Barry violated Iowa R. of Prof'l Conduct 32:1.3, which provides that a lawyer shall act with reasonable diligence and promptness in representing a client; that Barry failed to keep his client reasonably informed about the status of the matter, and failed to promptly comply with reasonable requests for information, contrary to Iowa R. of Prof'l Conduct 32:1.4(a)(3) and (4); that Barry made multiple knowing misrepresentations to his client and his client's family, contrary to Iowa R. of Prof'l Conduct 32:8.4(c); that by knowingly creating a fraudulent marriage dissolution decree with a forged judge's signature, and giving that writing to the Millers, intentionally misrepresenting that it was a valid Decree in the Miller marriage dissolution, Barry violated Iowa R. of Prof'l Conduct 32:8.4(b), which provides that it is professional misconduct for a lawyer to

commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, and Rule 32:8.4(c), by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Additionally, the Commission found, that Barry's conduct constituted conduct that is prejudicial to the administration of justice, violating Iowa R. of Prof'l Conduct 32:8.4(d). (Am. App. pp. 43-49)

The Commission recommended that Barry be suspended from the practice of law for eighteen (18) months and that Barry's reinstatement be subject to his completion of consistent, regular mental health therapy with a licensed mental health professional, together with proof of his fitness to practice law. (Am. App. p. 56) On September 14, 2017, Barry filed a notice of appeal. (Am. App. pp. 58-59)

STATEMENT OF THE FACTS

The Board's material allegations were admitted, either in Barry's Answer to the Board's Complaint, his Answers to the Board's Requests for Admissions, or in the Stipulation in this matter. (Am. App. pp. 17-23; Am. App. pp. 25-27; Am. App. pp. 29-36; Am. App. pp. 147-152; Am. App. pp. 158-159; Am. App. pp. 162-164; Am. App. pp. 166-194) This Court has determined that factual matters admitted by an attorney in an answer to a complaint are established without further investigation into the record.

Iowa Sup. Ct. Atty. Disc. Bd. v. Nelson, 838 N.W.2d 528, 532 (Iowa 2013) (citing *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Stowe*, 830 N.W.2d 737, 739 (Iowa 2013)). Additionally, pursuant to Iowa R. Civ. P. 1.511, all matters admitted in Barry’s Answers to the Board’s Request for Admissions are conclusively established for purposes of the disciplinary hearing. *Id.* Stipulations of facts are binding on the parties, and although this Court has held that it is not bound by a stipulation of a violation or of a sanction, it has stated it will rely on a stipulation to determine the facts in issue. *Iowa Sup. Ct. Atty. Disc. Bd. v. Gailey*, 790 N.W.2d 801, 804 (Iowa 2010). Based on Barry’s Answer to the Board’s Complaint, the parties’ Stipulation, and the admitted Exhibits, the Commission found that the Board established, by a convincing preponderance, the following facts:

Barry has been licensed to practice law in the courts of Iowa since 2008, and, at the time of the conduct alleged in the Board’s Complaint, he practiced law as a partner in a law practice in the town of Spencer, Clay County, Iowa. Barry is also licensed to practice law in the State of Colorado, where his license was suspended on May 1, 2012, following nonpayment of his inactive fee (Am. App. p. 17, ¶¶ 2, 3; Am. App. p. 25, ¶¶ 2, 3; Am. App. p. 125; Am. App. p. 142; Am. App. p. 151; Am. App. p. 29-30, ¶¶ 2, 3; Am. App. p. 44, ¶¶ 2, 3)

In May 2014, Barry was hired to represent Richard Miller (“Richard”) in his marriage dissolution from June Miller. Barry met with Richard, and Richard’s brothers, in late May, 2014, and obtained all the information necessary to draft Richard’s divorce Petition and a Stipulation. On May 27, 2014, Richard signed the dissolution Petition and the Stipulation that Barry had prepared, and Barry notarized Richard’s signature. On August 29, 2014, Barry notarized a power of attorney that Barry had prepared for Richard, in which Richard designated his brothers, Steve Miller (Steve), and William Miller (William), as agents with general authority to act for Richard, pursuant to Iowa Code Chapter 633B. (Am. App. pp. 17-18, ¶¶ 4, 5, 6; Am. App. p. 25, ¶¶ 4, 5, 6; Am. App. pp. 93-95; Am. App. pp. 97-100; Am. App. p. 112; Am. App. pp. 148-150; Am. App. pp. 169-177; Am. App. p. 30, ¶¶ 4, 5, 6; Am. App. pp. 44-45, ¶¶ 4, 5, 6)

Barry knowingly failed to file the Petition for Richard’s marriage dissolution and knowingly failed to have the Petition served on June Miller. Barry’s omissions were not inadvertent or the result of an error of judgment made in good faith. (Am. App. p. 18, ¶¶ 7, 8; Am. App. p. 25, ¶¶ 7, 8; Am. App. p. 30, ¶¶ 7, 8; Am. App. p. 113; Am. App. p. 45, ¶¶ 7,8)

From May 27, 2014, through the end of July 2015, when asked about the status of the matter by Richard, William, and Steve, Barry repeatedly knowingly misrepresented to them that Barry had filed the divorce petition, and failed to communicate that he had never filed or served the Petition on June. On one occasion, Barry knowingly and falsely stated that June had been served and had twenty days to answer. On another occasion, Barry knowingly and falsely stated that a default judgment could be obtained. When updates on the case were requested, Barry either failed to return telephone calls, or would knowingly and falsely state that the matter was progressing. (Am. App. pp. 18-19, ¶¶ 9, 10, 11, 12; Am. App. pp. 25-26, ¶¶ 9, 10, 11, 12; Am. App. pp. 112-113; Am. App. pp. 134-135; Am. App. p. 140; Am. App. p. 150; Am. App. p. 159; Am. App. pp. 30-31, ¶¶ 9, 10, 11, 12; Am. App. p. 45, ¶¶ 9, 10, 11, 12)

Richard, William, and Steve met with Barry to express their concerns about the length of time the dissolution was taking. Barry continued to knowingly misrepresent the status of the case. Barry drafted a proposed Decree for Richard and his family to review. He did not tell the Millers that he had not filed or completed service of the original Notice and dissolution Petition. In January 2015, Barry had still not filed the case, yet falsely stated

that “the Judge had signed the Decree, but there was a delay in getting them recorded.” (Am. App. p. 19, ¶¶ 13, 14, 15; Am. App. p. 26, ¶¶ 13, 14, 15; Am. App. pp. 31-32, ¶¶ 13, 14, 15; Am. App. pp. 45-46; Am. App. p. 69)

On or about July 8, 2015, Steve Miller went to Barry’s office to request copies of the Decree that Barry stated the Court had signed in Richard’s dissolution matter. Instead of telling Steve that the dissolution Decree was not signed, or that Barry had not yet filed the Petition for dissolution, Barry provided the Millers with a document that Barry knowingly and intentionally misrepresented as a copy of an original, genuine decree that dissolved the marriage of Richard and June Miller, signed by Judge Patrick Carr on January 14, 2015, at 11:33 A.M. (Am. App. pp. 19-20, ¶¶ 16, 17, 23; Am. App. p. 26, ¶¶ 16, 17, 23; Am. App. pp. 32-33, ¶¶ 16, 17, 23; Am. App. p. 113; Am. App. p. 150; Am. App. pp. 46-47)

The document that Barry provided to the Millers was not a copy of an original dissolution decree in the Miller case, but instead was a fraudulent document that Barry knowingly and intentionally created, by altering each page of the Decree document Barry had drafted, to misrepresent a signed dissolution decree in the Miller case. To create the fraudulent dissolution decree document, Barry knowingly and intentionally copied a signature

page from an Order setting Hearing in an unrelated case, case CDCD003432, bearing Judge Patrick M. Carr's signature, and attached the judge's signature page, without Judge Carr's knowledge or authorization, to the fraudulent Miller dissolution "Decree." Barry altered the case title on the judge's signature page from case CDCD003432, before Barry attached it to the fraudulent Miller "Decree" paperwork, so that the case title read "MILLER, RICHARD VS MILLER, JUNE." Barry altered the case number on the judge's signature page, from case CDCD003432, to read "CDCD004523," before Barry attached it to the fraudulent Miller dissolution "Decree" document. Barry also inserted case number CDCD004523 on the first page of the purported dissolution "Decree" document, and inserted the file stamp data "E-FILED 2015 JAN 14 11:33 AM CLAY – CLERK OF DISTRICT COURT" on the top of all four pages of the fraudulent paperwork, before providing it to the Millers. (Am. App. pp. 19-20, ¶¶ 18, 19, 20, 21, 22, 23; Am. App. p. 26, ¶¶ 18, 19, 20, 21, 22, 23; Am. App. pp. 32-33, ¶¶ 18, 19, 20, 21, 22, 23; Am. App. pp. 71-74; Am. App. p. 113; Am. App. pp. 131-132; Am. App. p. 140; Am. App. pp. 147-151; Am. App. pp. 158-159; Am. App. pp. 46-47, ¶¶ 18, 19, 20, 21, 22, 23)

On July 27, 2015, members of Richard's family went to the Clay County Clerk of Court's office to search for divorce records relating to Richard's dissolution. Clay County Clerk's staff could not locate the Miller dissolution of marriage in court records. Clay County Clerk of Court's staff contacted Barry's law office and spoke with staff in Barry's law office, in Barry's absence, to inquire about the Miller dissolution case. Subsequently, Clay County Clerk of Court's staff sought assistance from electronic data management system support staff in Des Moines in regard to the fraudulent paperwork that Barry had given to the Miller family. The judge's signature page that Barry attached to the fraudulent Miller "Decree" paperwork, bearing the signature of Judge Patrick Carr, actually belonged to an Order Setting Hearing filed on January 14, 2015, in a case unrelated to the Miller dissolution matter, bearing the case number CDCD003432, in which Barry was electronically served as the attorney representing a case respondent. There was no dissolution Decree signed by the Court and filed in the Miller dissolution. On July 30, 2015, the Clay County Clerk of Court emailed the Chief Judge for the Third Judicial District, Judge Duane E. Hoffmeyer, to inform him of the situation. Chief Judge Hoffmeyer telephoned the Attorney Disciplinary Board, and later, provided affidavits from the Clay County Clerk of Court and her staff, a letter from Miller's family, and a

copy of the forged decree and other supporting documentation. (Am. App. p. 21, ¶ 24; Am. App. p. 26, ¶25; Am. App. pp. 33-35, ¶¶ 24, 25, 26; Am. App. pp. 47-49; Am. App. pp. 64-80; Am. App. p. 148)

Subsequently, Barry, through counsel, wrote a letter concerning the matter to the Attorney Disciplinary Board and made application, pursuant to Rule 42.6 of the Commission on Continuing Legal Education and Rule 39.7 of the Client Security Commission of the Supreme Court of Iowa, to place his Iowa license to practice law in inactive status. Certificates of Exemption, placing Barry's license in active status, were granted on March 3, 2016. (Am. App. p. 22, ¶ 27; Am. App. p. 27, ¶27; Am. App. p. 35, ¶ 27; Am. App. p. 49, ¶ 27; Am. App. pp. 110-116; Am. App. p. 127; Am. App. p. 129; Am. App. pp. 150-152)

ETHICAL VIOLATIONS

A. Iowa R. of Prof'l Conduct 32:1.3 The Commission found that by knowingly failing to timely file and serve his client's Petition for dissolution, Barry violated Iowa Rule of Professional Conduct 32:1.3, which provides that a lawyer shall act with reasonable diligence and promptness in representing a client. (Am. App. pp. 18, 22; Am. App. pp. 26-27; Am. App. pp. 30, 35; Am. App. pp. 110-116; Am. App. pp. 45, 49)

Barry was hired to handle Richard Miller's dissolution from his spouse, June. Barry's Answer admits that Barry met, for the first time, with Richard Miller, and a couple of Richard's brothers, in late May, 2014, and that at that time, Barry obtained all the information necessary to draft Richard's divorce petition and a Stipulation. On May 27, 2014, Richard went to Barry's office and signed both the dissolution petition and the Stipulation that Barry had prepared. Barry notarized Richard's signature on the divorce petition on May 27, 2014. (Am. App. pp. 17-18, ¶¶ 5-6; Am. App. p. 25, ¶¶ 5-6; Am. App. p. 30, ¶¶ 5-6; Am. App. pp. 93-100; Am. App. p. 112; Am. App. pp. 44-45, ¶¶ 5-6)

From May 27, 2014, through the end of July 2015, a period of fourteen months, Barry knowingly failed to file the proper filing, the petition for Richard's marriage dissolution, to commence the matter, and knowingly failed to have the petition served on June Miller. (Am. App. p. 18, ¶7; Am. App. p. 25, ¶7; Am. App. p. 30, ¶7; Am. App. p. 45, ¶7) Barry's omissions were not inadvertent or the result of an error of judgment made in good faith. (Am. App. p. 18, ¶8; Am. App. p. 25, ¶8; Am. App. p. 30, ¶8; Am. App. p. 45, ¶8) Barry acknowledged, in his letter to the Board, that Richard's divorce was simple, and not complicated. (Am. App. p. 112) When Barry's neglect was finally discovered by the client, who hired

another attorney to handle the divorce, a petition was filed on August 27, 2015, and the dissolution decree was entered on January 21, 2016. (Am. App. pp. 118-120) The entire dissolution required less than six months to complete.

Barry's neglect, and his failure to communicate about the matter, is comparable to the conduct in *Iowa Sup. Ct. Atty. Disc. Bd. v. Weiland*, 885 N.W.2d 198 (Iowa 2016), where an attorney failed to file the client's dissolution petition for four months, failed to respond to client phone calls and requests for information, and failed to notify the client of what progress had or had not been made on the case. The attorney in *Weiland* had difficulty filing the divorce petition with EDMS, and following the rejection of the petition, failed to communicate with the client that the attorney was having difficulties. This Court suspended Weiland's license to practice law for sixty days, stating "Weiland's actions following the rejection of his filing demonstrate both a 'consistent failure' to perform and a 'conscious disregard' for the obligations he had to . . . [the client] . . ." (internal citations omitted) *Id.* at 208. For a period of four months, from April through July, Weiland's client was misled into believing the divorce petition had been filed. In August, when the client contacted Weiland with questions, he failed to return the client's telephone calls. *Id.*

“When an attorney ‘fails to appear at scheduled court proceedings, does not make the proper filings, or is slow to act on matters,’ he or she violates rule 32:1.3.” *Weiland*, at 208 (quoting *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Kingery*, 871 N.W.2d 109, 117 (Iowa 2015) (quoting *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Nelson*, 838 N.W.2d 528, 537 (Iowa 2013))).

Barry’s neglect was more egregious than that of the attorney in *Weiland*, who at least made an attempt to file his client’s dissolution action. Weiland’s attempt to file the client’s petition failed, due to Weiland’s difficulty with the EDMS electronic filing system. Unlike Weiland, Barry never made any attempt to file his client’s dissolution action. Barry’s neglect was knowing and deliberate.

Barry acknowledged, in his Answer to the Board’s Complaint, in his Stipulation, and in his letter to the Board, and the Commission found, that he knowingly failed to file, and to serve, his client’s petition for dissolution, and that his omissions were not inadvertent or the result of an error of judgment made in good faith, and that he failed to act with reasonable diligence and promptness in representing Miller, violating Iowa Rule of

Professional Conduct 32:1.3. (Am. App. pp. 18, ¶¶7-9; Am. App. pp. 25, ¶¶7-9; Am. App. pp. 30-1, ¶¶7-9; Am. App. pp. 112-113; Am. App. p. 49, ¶¶7-9)

Barry's neglect was also more egregious than the attorney in *Weiland* because Barry's neglect continued for fourteen months, a much longer period of time.

B. I.R.P.C. 32: 1.4(a) (3) and 32:1.4(a) (4) Barry admitted in his Answer to the Board's Complaint, and the Commission found, that he violated Iowa Rules of Professional Conduct 32:1.4(a) (3) and (4), which provide that a lawyer shall keep the client reasonably informed about the status of the matter, and promptly comply with reasonable requests for information. (Am. App. pp. 18-19, ¶¶9-12; Am. App. p. 22, ¶28; Am. App. pp. 25-27, ¶¶9-12, ¶28; Am. App. pp. 30-31, ¶¶9-12; Am. App. p. 35, ¶28; Am. App. p. 91; Am. App. p. 113; Am. App. pp. 134-136; Am. App. pp. 45, ¶¶9-12; Am. App. p. 49)

Comment 1 and Comment 4 to Rule 32:1.4(a) state, in relevant part:

Comment [1]

Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Comment [4]

A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation.

This Court has found that an attorney violates Rule 32:1.4(a)(4) when “he or she fails to keep their client informed about the progress on the case, repeatedly fails to respond to requests for information, or does not respond to a client’s attempts to contact the attorney.” *Weiland*, 885 N.W.2d 198, at 209 (quoting *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Silich*, 872 NW.2d 181, 189-90 (Iowa 2015)).

From May 27, 2014, through the end of July 2015, Barry failed to communicate the fact that he had never filed the petition, and had never served the signed dissolution petition on June. Barry was contacted for updates on the case many times. Barry either failed to return telephone calls, or would knowingly and falsely state that the matter was progressing. Richard, William, and Steve met with Barry at Barry’s office to express their concerns about the length of time the dissolution was taking. Barry knowingly did not advise Richard or his family members that the dissolution petition had not yet been filed or served on June. After this meeting, client requests to Barry for updates occurred almost daily. Barry either failed to respond to the requests for updates or, when he did respond, continued to knowingly misrepresent the status of the case. Barry drafted a proposed decree for Richard and his family to review. He did not tell the

Millers that he had not filed or completed service of the original notice and dissolution petition. (Am. App. pp. 18-19, ¶¶ 9-15; Am. App. p. 25-6, ¶¶ 9-15; Am. App. pp. 30-32, ¶¶ 9-15; Am. App. p. 69; Am. App. pp. 112-113; Am. App. pp. 134-135; Am. App. p. 140; Am. App. p. 150; Am. App. p. 159; Am. App. pp. 45-46, ¶¶ 9-15)

Barry's failure to communicate with his client and his failure to respond to requests for information about the case were knowing, and deliberate. Barry's failure to communicate with his clients and to respond to reasonable requests for information continued for a much longer time period than in *Weiland*. After fourteen months passed, the Millers finally learned the true status of the matter from the Clerk of Court's office. (Am. App. p. 91)

C. Iowa R. of Prof'l Conduct Rule 32:8.4(c) Not only did Barry fail to keep his client reasonably informed about the status of the dissolution, Barry repeatedly made knowing false statements concerning the matter to his client and his client's family, violating Iowa Rule of Professional Conduct 32:8.4(c), which provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. (Am. App. pp. 18-19, ¶¶ 9-15; Am. App. pp. 25-6, ¶¶ 9-15; Am. App. pp. 30-32, ¶¶ 9-15; Am. App. pp. 45-46, ¶¶ 9-15; Am. App. p.

49) For fourteen months, when asked about the status of the matter by Richard, William, and Steve, Barry repeatedly knowingly misrepresented to them that Barry had filed the divorce petition. Barry made false statements regarding the filing status of the case, service of process on June, case progress, and the reason for the delay in obtaining a dissolution decree. (Am. App. pp. 18-19, ¶¶9-18; Am. App. pp. 25-6, ¶¶9-18; Am. App. pp. 134-136; Am. App. p. 113)

When a violation of Rule 32:8.4(c) (dishonesty, fraud, deceit, or misrepresentation) is alleged, this Court requires “a reasonable level of scienter.” *Weiland*, 885 N.W.2d 198, 211 (quoting *Iowa Sup. Ct. Atty. Disciplinary Bd. v. Stoller*, 879 N.W.2d 199, 212 (Iowa 2016) (quoting *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Qualley*, 828 N.W.2d 282, 292 (Iowa 2013))). In making that determination, this Court considers whether the effect of the lawyer’s conduct is to mislead or to inform. *Weiland*, at 211-212.

In his Answer, Barry admitted that from May 27, 2014, through the end of July 2015, when asked about the status of the matter by Richard, William, and Steve, Barry knowingly misrepresented to them that Barry had filed the divorce petition. Barry knowingly and falsely stated that June had

been served and had twenty days to answer. Barry knowingly and falsely stated that a default judgment could be obtained. (Am. App. pp. 18-19, ¶¶10,11; Am. App. pp. 25-6, ¶¶10, 11; Am. App. p. 31, ¶¶10, 11; Am. App. p. 45, ¶¶10, 11; Am. App. p. 113; Am. App. p. 136; Am. App. p. 159)

Barry either failed to respond to requests for updates or, when he did respond, continued to knowingly misrepresent the status of the case, falsely stating that the matter was progressing. In January 2015, although Barry had still not filed the case, he falsely stated that “the Judge had signed the decree, but there was a delay in getting them recorded.” (Am. App. p. 19, ¶¶12, 13, 15; Am. App. p. 26, ¶¶12, 13, 15; Am. App. pp. 31-32, ¶¶12, 13, 15; Am. App. pp. 45-46, ¶¶12, 13, 15; Am. App. p. 113; Am. App. pp. 135-136)

Barry’s letter to the Board admits that his false statements were intended to mislead his clients and conceal his neglect of the case: “I had obviously spent considerably more time making excuses for the delay than it would have taken to just file the paperwork . . .” (Am. App. p. 113) Barry intended to conceal his neglect, by letting the Millers believe the dissolution petition was filed in 2014, when, in truth, it had not been filed. He also intended to conceal his neglect when he stated that June was served, and had twenty days to answer, which was untrue; and when he later stated, that

a default judgment could be obtained, and that the case was progressing. These statements could not have been true, and Barry knew it, because he knew he had not yet filed the dissolution petition, to commence the matter. (Am. App. p. 113; Am. App. pp. 135-136) Barry's misrepresentations and deceit compounded his neglect.

D. Iowa R. of Prof'l Conduct 32:8.4(b) In addition to finding that Barry had neglected his client's case, failed to keep his client reasonably informed about the status of the matter, and made misrepresentations about the case, the Commission found that by knowingly creating a fictitious marriage dissolution decree, and attaching a signature page containing a judge's signature from a different case, without the authorization of the judge, inserting filing data on pages and changing the case title on the Judge's signature page and giving that writing to the Millers, intentionally misrepresenting that it was a valid Decree in the Miller marriage dissolution, Barry violated Iowa R. of Prof'l Conduct 32:8.4(b), which provides that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. (Am. App. pp. 46-48, ¶¶18, 19, 20, 21, 22, 23, 25, 25A, 25B)

Iowa Code Section 715A.2 provides that it is a criminal act to, with intent to defraud, or with knowledge of facilitating a fraud, alter a writing of another without the other's permission; or to make, complete, execute, authenticate, issue or transfer a writing so that it purports to be the act of another who did not authorize that act, or so that it purports to have been executed at a time or place or in a numbered sequence other than was in fact the case, or so that it purports to be a copy of an original when no such original existed; or to utter a writing which the person knows to be forged in the foregoing manner. *Id.*

Iowa Code Section 715A.1 provides that the term “writing” includes printing or any other method of recording information, and includes stamps and other symbols of identification. *Id.*

Iowa R. Prof'l Conduct 32:1.0 defines a “writing” to include a tangible or electronic record of a communication or representation, and defines a “signed writing” to include an electronic symbol or process attached to or logically associated with a writing, and executed or adopted by a person, with the intent to sign the writing. *Id.*

On or about July 8, 2015, Steve went to Barry's office to request copies of the decree that Barry told him that the Court had signed in Richard's dissolution matter. (Am. App. p. 19, ¶16; Am. App. p. 26, ¶16;

Am. App. p. 32, ¶16; Am. App. p. 46, ¶16; Am. App. p. 113) In his Answer, Barry admits that instead of telling Steve that the dissolution decree was not signed, or that Barry had not yet filed the petition for dissolution, Barry gave Steve a document that Barry admits he knowingly and intentionally misrepresented as a copy of an original decree that dissolved the marriage of Richard and June Miller. The document that Barry gave to Steve was not a copy of an original dissolution decree in the Miller case. It was a fraudulent document that Barry admits he knowingly and intentionally created, by altering each page of the Decree document Barry had drafted, to misrepresent a signed dissolution decree in the Miller case. (Am. App. pp. 19-20, ¶¶17, 18; Am. App. p. 26, ¶¶17, 18; Am. App. p. 32, ¶¶17, 18; Am. App. p. 46, ¶¶17, 18; Am. App. pp. 71-74; Am. App. pp. 102-105; Am. App. p. 113)

To create the fraudulent dissolution decree document, Barry admits that he knowingly and intentionally copied a signature page from an Order setting Hearing in an unrelated case, case CDCD003432, bearing Judge Patrick M. Carr's signature, and attached the judge's signature page, without Judge Carr's knowledge or authorization, to the purported Miller dissolution "Decree" that Barry created and delivered. (Am. App. p. 20, ¶19; Am. App. p. 26, ¶19; Am. App. p. 32, ¶19; Am. App. pp. 46-47, ¶19; Am.

App. pp. 71-74; Am. App. pp. 76-77; Am. App. pp. 102-105; Am. App. p. 113; Am. App. pp. 131-132)

Barry altered the case title on the judge's signature page from case CDCD003432 before Barry attached it to the fraudulent Miller "Decree" paperwork, so that the case title read "MILLER, RICHARD VS MILLER, JUNE." (Am. App. p. 20, ¶20; Am. App. p. 26, ¶20; Am. App. p. 33, ¶20; Am. App. p. 47, ¶20; Am. App. pp. 71-74; Am. App. pp. 102-105; Am. App. p. 113; Am. App. p. 132)

Barry altered the case number on the judge's signature page from case CDCD003432, to read "CDCD004523," before Barry attached it to the fraudulent Miller dissolution "Decree" document. Barry also inserted case number "CDCD004523" on the first page of the purported dissolution "Decree" document. (Am. App. p. 20, ¶21; Am. App. p. 26, ¶21; Am. App. p. 33, ¶21; Am. App. p. 47, ¶21; Am. App. pp. 71-74; Am. App. p. 113; Am. App. p. 132; Am. App. p. 140)

Barry inserted the file stamp data "E-FILED 2015 JAN 14 11:33 AM CLAY – CLERK OF DISTRICT COURT" on the top of all four pages of the fraudulent paperwork. (Am. App. p. 20, ¶22; Am. App. p. 26, ¶22; Am. App. p. 33, ¶22; Am. App. p. 47, ¶22; Am. App. pp. 71-74; Am. App. pp. 102-105; Am. App. pp. 131-132)

Barry admits, in his Answer to the Board's Complaint, and he stipulated, that he gave the fraudulent paperwork he created to the Millers, knowingly and intentionally misrepresenting that the Miller dissolution petition was filed, that the dissolution decree was signed by Judge Patrick Carr on January 14, 2015, at 11:33 A.M., and that the paperwork Barry gave the Millers was a copy of a genuine decree that dissolved the marriage of Richard and June Miller. (Am. App. p. 20, ¶23; Am. App. p. 26, ¶23; Am. App. p. 33, ¶23; Am. App. pp. 71-74; Am. App. p. 113; Am. App. pp. 102-105; Am. App. p. 147)

This Court has held that forging a signature is conduct that involves dishonesty, fraud, deceit, and misrepresentation, and that it adversely reflects on the fitness of a lawyer to practice law. *Iowa Supreme Ct. Atty. Disciplinary Bd. v. Thompson*, 732 N.W.2d 865 (Iowa 2007). “Honesty is a fundamental, base line requirement to the practice of law.” *Id.*, at 867 (citing *Comm. on Prof'l Ethics & Conduct v. Bauerle*, 460 N.W.2d 452, 453 (Iowa 1990)).

A lawyer may be found in violation of Rule 32:8.4(b) even though the lawyer has not been charged with or convicted of a crime. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Lustgraaf*, 792 N.W.2d 295, 299 (Iowa 2010), citing *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Bell*, 650 N.W.2d

648, 651-52 (Iowa 2002) (discussing comparable DR 1-102(A)(3)¹ of the Iowa Code of Professional Responsibility for Lawyers and citing cases). In *Bell*, this Court stated that, “misappropriation clearly reflects adversely on his character, and hence, his fitness to practice law.” *Id.*

Barry admitted, in his Answer, that his conduct was knowing and willful. The fact that Respondent may not have been convicted of or criminally charged for the conduct violating Iowa Code Section 715A.2, does not relieve Respondent of sanction for the misconduct under Rule 32:8.4(b). It is the commission of a criminal act reflecting adversely on a lawyer’s fitness to practice law, not the act of getting caught committing a crime, which constitutes a violation of this rule. *Iowa Supreme Court Att’y Disciplinary Bd. vs. Karen A. Taylor*, 887 N.W.2d 369, 378 (Iowa 2016) (finding that lawyer’s willful failure to file state or federal income tax returns constituted a criminal offense under federal and state law, and reflected adversely on her fitness to practice law, resulting in a violation of rule 32:8.4(b) and a six month suspension, although she was not criminally charged) (citing *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Lustgraaf*, 792

¹ In *Bell*, lawyer’s unauthorized personal use of an organization’s funds was held, even though lawyer was not criminally charged or convicted, to have constituted misappropriation, as defined in Iowa Code section 714.1(2), and violated Disciplinary Rules 1-102(A)(3),(4), and (6) (lawyer shall not: engage in illegal conduct involving moral turpitude; engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; engage in any other conduct that adversely reflects on the fitness to practice law. *Bell*, at

N.W.2d 295, 299 (Iowa 2010)). “Thus, an attorney who commits a criminal act reflecting adversely on his or her fitness as a lawyer may be found to have violated rule 32:8.4(b) even if the authorities never charged the attorney with a crime. *Id.*” *Taylor*, N.W.2d 369, at 378.

E. Iowa R. of Prof'l Conduct 32:8.4(c) In addition to constituting criminal conduct under Iowa Code Section 715A.2, Barry’s admittedly knowing and intentional creation of a fictitious court document purporting to dissolve a marriage, with a forged judge’s signature, delivering the document, and intentionally misrepresenting that it was a copy of an original, when no such original existed, constituted conduct that involved dishonesty, fraud, deceit, and misrepresentation, and clearly reflects adversely on his fitness to practice law, contrary to Iowa R. of Prof'l Conduct 32:8.4(c). *Thompson*, 732 N.W.2d 865, 867 (Iowa 2007)²; *See also, Iowa Supreme Court Att’y Disciplinary Bd. v. McGinness*, 844 N.W.2d 456 (2014).

651-52. As of July 1, 2005, the Rules of Professional Conduct replaced the Disciplinary Rules set forth in the Iowa Code of Professional Responsibility for Lawyers.

² In *Thompson*, forging a signature on a court document was held to have violated Disciplinary Rules 1-102(A)(4),(5), and (6) (lawyer shall not: engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; engage in conduct that is prejudicial to the administration of justice; engage in any other conduct that adversely reflects on the fitness to practice law). *Id.* at 867.

Barry's misrepresentation and deceit were intended to hide his neglect, his lack of communication about the true status of the matter, and his past false statements.

In *McGinness*, a lawyer was suspended for six months after photocopying old certificates of service and attaching them to discovery requests sent to opposing counsel, in an attempt to deceive opposing counsel into believing McGinness had served him with discovery requests, when McGinness had not done so. When confronted about the matter by opposing counsel, McGinness attempted to cover his tracks with more fabrication. This Court held that his conduct violated rule 32:8.4(c), stating: "fundamental honesty is the base line and mandatory requirement to serve in the legal profession." *Id.* at 464 (quoting, [*Iowa Supreme Court Att'y Disciplinary Bd. v. J Kallsen*, 814 NW.2d [233] at 238-39 [Iowa 2012]]).

In his Answer, Barry admitted that he knowingly and intentionally misrepresented that the Miller dissolution petition was filed, that the dissolution decree was signed by Judge Patrick Carr on January 14, 2015, at 11:33 A.M., and that the paperwork Barry gave the Millers was a genuine decree that dissolved the marriage of Richard and June Miller. (Am. App. p. 20, ¶23; Am. App. p. 26, ¶23; Am. App. p. 33, ¶23; Am. App. p. 47, ¶23) The fictitious dissolution decree was not a copy of an original, signed,

dissolution decree, and Respondent knew it, because, like the attorney in *McGinness*, Barry created the fictitious document. (Am. App. p. 113; Am. App. pp. 135-136; Am. App. p. 140; Am. App. p. 147) Barry knew, for fourteen months, that he had not filed the petition necessary to commence Richard's divorce action, and that he had made false statements concerning the matter. By knowingly creating a fraudulent marriage dissolution decree, and attaching a signature page with a judge's signature from a different case, without the authorization of the judge, inserting filing data and changing the case title on the Judge's signature page and giving that writing to the Millers, and intentionally misrepresenting that it was a valid Decree in the Miller marriage dissolution, Barry intended to "cover his tracks with more fabrication," like the attorney in *McGinness*, and violated Iowa R. of Prof'l Conduct 32:8.4(c).

F. Iowa R. of Prof'l Conduct 32:8.4(d) In his Answer Barry admitted, and the Commission found, that Barry's conduct in this matter violated Iowa R. of Prof'l Conduct 32:8.4(d), which provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. (Am. App. p. 23, ¶32; Am. App. p. 27, ¶32; Am. App. pp. 49, 55-56)

This Court has held that this includes conduct by a lawyer that hampers “the efficient and proper operation of the courts or of ancillary systems upon which the courts rely.” *Iowa Sup. Ct. Atty. Disc. Bd. v. Templeton*, 784 N.W.2d 761, 768 (Iowa 2010). It is violated “when [an attorney’s] misconduct results in additional court proceedings or causes court proceedings to be delayed or dismissed.” *Iowa Sup. Ct. Atty. Disc. Bd. v. Dolezal*, 841 N.W.2d 114, 124 (Iowa 2013) (quoting *Iowa Sup. Ct. Atty. Disc. Bd. v. Rhinehart*, 827 N.W.2d 169, 180 (Iowa 2013)).

Respondent’s misconduct, in failing to act with reasonable diligence and promptness in filing the dissolution matter, in failing to keep his client informed or comply with requests for information from his client and client’s family, and in knowingly creating false documents and making false statements, and misrepresentations regarding the matter to his client and client’s family, resulted in significant, unnecessary, administrative oversight and expenditure of time and effort by the Clerk of Court’s Office, and other judicial branch personnel. Clerk of Court staff expended significant time with the Millers, searching court records, verifying cases, acquiring information, and in preparing documents reporting Respondent’s misconduct to others within the judicial and attorney disciplinary systems. (Am. App. pp. 64-108)

Barry's misconduct, in neglecting the dissolution matter and in failing to communicate with, and making false statements and misrepresentations to, his client and client's family, adversely affected the judicial system by unnecessarily delaying the client's dissolution proceedings for fourteen months. (Am. App. p. 38) Once the dissolution petition was filed, the dissolution took less than six months. (Am. App. pp. 118-123)

This Court has also held that forging a signature on a court document constitutes conduct that is prejudicial to the administration of justice. *Thompson*, 732 N. W. 2d at 867.

ARGUMENT

I. WHETHER THE COMMISSION'S RECOMMENDATION THAT BARRY BE SUSPENDED FOR A PERIOD OF EIGHTEEN MONTHS IS AN EXCESSIVE SANCTION?

A. Preservation, Scope and Standard of Appellate Review

Barry preserved this issue for appellate review.

The Board agrees that the Court's standard of review is *de novo*. Iowa Ct. R. 36.22(4).

B. The Commission's Sanction Recommendation is Not Excessive

Iowa Ct. R. 36.19(1) empowered the Commission to "dismiss the complaint, issue a private admonition, recommend that the supreme court reprimand the respondent or suspend or revoke the respondent's license." If

the commission recommends a reprimand, suspension, or revocation, then it may recommend additional or alternative sanctions. *Id.*

In considering an appropriate sanction, the Barry Commission's Findings reflect thoughtful and reasoned consideration to the factors this Court has determined are material: "all the facts and circumstances, including the nature of the violations, the attorney's fitness to practice law, deterrence, the protection of society, the need to uphold public confidence in the justice system, and the need to maintain the reputation of the bar . . . (citation omitted) . . . [w]e also consider mitigating and aggravating circumstances," (Am. App. pp. 49-50), (citing, *Iowa Supreme Court Att'y Disciplinary Bd. v. McGinness*, 844 N.W.2d 456, 463 (Iowa 2014) (citations omitted) (attorney suspended for six months after repeatedly lying to opposing counsel and the court)).

Keeping in mind that the primary goal of attorney discipline is to provide for the protection of the public (*Iowa Supreme Court Att'y Disciplinary Bd. v. Taylor*, 887 N.W.2d 369, 379 (Iowa 2016)), and to deter other lawyers from similar misconduct, (*Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Bell*, 650 N.W.2d 648, 652 (Iowa 2002)), in determining the appropriate sanction, the Barry Commission evaluated case precedent, and stated that it gave most weight to the cases of *Iowa Supreme*

Ct. Att’y Disciplinary Bd. v. Thompson, 732 N.W.2d 865 (Iowa 2007) (nine month suspension), and *In the Matter of Rickabaugh*, 661 N.W.2d 130 (Iowa 2003) (three year suspension). (Am. App. p. 50-1) The Commission found, as it tailored its recommendation to this Court, based on the specific facts and circumstances of Barry’s case, that Barry’s conduct concerning the forged court order was most similar to the conduct in the *Thompson* and *Rickabaugh* cases.

Nature of Respondent’s Conduct and Fitness to Practice

The nature of each of Barry’s six separate rule violations is serious.

Misrepresentation, by itself, is a serious rule violation. Respondent engaged in repeated misrepresentations, throughout the fourteen month duration of his representation, to conceal his neglect.

In *McGinness*, 844 N.W.2d 456, at 465-66, this Court rejected a lawyer’s contention that while he committed multiple offenses, they did not arise out of separate, unrelated incidents, but were part of a single course of conduct. Stating, “[w]e expect honesty in all aspects of the practice of law,” this Court imposed a six month suspension:

This case does not involve an isolated false statement, in itself a serious offense. See [*Iowa Supreme Court Att’y Disciplinary Bd.*] *v. Van Ginkel*, 809 N.W. 2d 96 [Iowa (2012)], at 111. Instead, McGinness repeatedly lied to opposing counsel and to the district court. He also attempted

to justify his conduct in communications with his client. McGinness had numerous opportunities to withdraw from his perilous course, but instead simply dug himself into a progressively deeper ethical pit. We have not regarded such repeated misconduct as irrelevant because it is part of an ongoing unethical course of conduct.

McGinness, at 465–66 (citations omitted).

“Neglect, in and of itself, is a serious matter, particularly when it is not an isolated occurrence.” *Iowa Sup. Ct. Bd. of Prof. Ethics & Conduct v. Stein*, 586 N.W.2d 523, 526 (Iowa 1998) (lawyer with no prior disciplinary record suspended for six months after neglecting legal matters by failing to timely mail or file documents and making false statements to opposing counsel and the court as to the mailing and delivery dates of the documents).

“[A]ll forms of dishonesty and misrepresentation are serious violations, and impact many of the factors used in determining the appropriateness of discipline.” *Thompson*, 732 N.W.2d 865, at 868 (Iowa 2007) In *Thompson*, this Court imposed a nine month suspension after a lawyer signed the name of a judge to an order setting a juvenile delinquency matter for hearing without the knowledge or authorization of the judge. The Barry Commission found that “the nature and extent” of Barry’s misconduct was greater than the attorney’s conduct in *Thompson*: “Thompson’s conduct and extent of ethical violations were much less than that of Respondent

Barry,” and “while *Thompson* addresses a forged order, the legal nature and consequences to a scheduling order are significantly less than that of a dissolution of marriage decree.” (Am. App. p. 51) Further, the Commission concluded, that Barry’s actions, “conducted in an effort to deceive the client, go beyond the work that would have actually been required to do the work necessary to complete the task for which the Respondent had been hired.” (Am. App. p. 50)

In *Thompson*, 732 N.W. 2d 865, at 868, this Court discussed the nature of the attorney’s misconduct:

First, the forgery was a bold, clear and calculated act of dishonesty. Unlike cases involving the forged signature of a client where a lawyer may feel a false sense of justification as a representative agent, it is hard to imagine how a lawyer could ever possess even a momentary sense of justification in forging the signature of a judge on a court order.

Thompson, at 868 (citation omitted).

In relation to Barry’s numerous and repeated rule violations, the Commission stated, “[w]hile we do not condone any of the behavior of the Respondent, the Commission finds the fictitious creation and forging of a court order to be the most egregious of the violations,” noting that “Respondent admits he knowingly and intentionally created the Decree document he used to misrepresent a signed dissolution Decree in the Miller

case.” (Am. App. pp. 19-20, ¶18; Am. App. p. 26, ¶18; Am. App. p. 32, ¶18; Am. App. pp. 71-74; Am. App. pp. 102-105, Am. App. p. 113; Am. App. pp. 46, 50)

The Commission determined that Barry’s case was most similar to *In the Matter of Rickabaugh*, 661 N.W.2d 130, 133 (Iowa 2003), where, in a reciprocal discipline proceeding, this Court suspended the lawyer’s license to practice law for three years. The lawyer in *Rickabaugh* accepted work he was not competent to handle, neglected the matter, failed to keep clients advised of developments in the case, and created fictitious pleadings, including forging a judge’s signature, in an attempt to persuade the client that Rickabaugh obtained a judgment in the client’s favor, which was untrue. In *Rickabaugh*, this Court noted that “[w]hen combined with other serious misconduct, tendering a false document to the court may warrant disbarment in Iowa” (citation omitted), and stated that “Rickabaugh’s action, fortunately, fell short of such fatal misconduct. This is only a minor mitigating factor here, however, because - due to Rickabaugh’s neglect - there was no case in which to file the forged document.” *Id.* at 133. Similarly, there was no open dissolution case in which Barry could file the forged Decree he had created, to conceal his neglect from his client. This was unknown to the client until his and his family’s investigation into the

matter, due to Barry's repeated misrepresentations over the fourteen month period. The Barry Commission noted that Barry "has violated more ethics rules" than the attorney violated in *Rickabaugh*, who received a three year suspension. (Am. App. p. 51)

Protection of the Public & Deterrence

"The primary goal of attorney discipline is to protect the public, not to punish the attorney." *Taylor*, 887 N.W. 2d at 379 (citation omitted).

In *Bell*, 650 N. W. 2d 648, at 652, this Court stated that the nature and extent of the attorney's ethical violations are considered to determine fitness to practice law, and also to deter other lawyers from similar misconduct. "The disciplinary process is intended to protect not only the public, but also our system of justice (citation omitted)." *Id.*

In relation to its recommendation of an eighteen month suspension for Barry, the Commission stated that "a shorter suspension did not seem to adequately address the gravity of the facts herein and the potential adverse consequence to the public." (Am. App. p. 57) Over a period of fourteen months, from May, 2014, through the end of July, 2015, Barry violated six different rules: 32:1.3 (lack of diligence); 32:1.4(a)(3) (failure to keep client reasonably informed); 32:1.4(a)(4) (failure to promptly comply with reasonable requests for information); 32:8.4(b) (criminal conduct that

reflects adversely on his fitness to practice, by creating a fraudulent document with a forged judge's signature); 32:8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) by repeatedly making false statements in an attempt to conceal his neglect and later, compounding his deceit and misrepresentation by creating a fictitious document, representing that it was a copy of a valid original, and 32:8.4(d) (conduct prejudicial to the administration of justice).

According to Barry, he has received treatment for depression. In order to protect the public, Respondent should be required to show that he is fit to practice law prior to being reinstated. In Barry's situation, fitness to practice law would include providing evidence that Respondent has successfully completed treatment for depression.

An attorney whose license is suspended for a period not exceeding 60 days is not required to file an application for reinstatement. Iowa Ct. R. 34.23(2). Suspensions exceeding 60 days require lawyers to apply for reinstatement and meet any conditions imposed for reinstatement, such as demonstrating compliance with treatment, and a fitness to practice law. *Id.*; Iowa Ct. R. 34.23(1).

Maintenance of the Reputation of the Bar & Public Confidence

In *Bell*, 650 N.W.2d 648, at 652, this Court stated that “[o]nly by ensuring that such conduct does not become commonplace or acceptable can we maintain the reputation of the bar and safeguard the integrity of our system of justice and the public’s confidence in it (citation omitted).”

The Barry Commission stated that it recommended a lengthy suspension based on its “intention to signal to the Respondent and the entire legal profession the significance of forgery of an Order, and more importantly, an Order that impacts the legal standing of a client. Further, it is our intention to attempt to restore the reputation of the bar and uphold public confidence in the justice system.” (Am. App. pp. 56-57)

This Court has determined, that “[e]ach time an attorney betrays a client’s trust by failing to fulfill professional obligations, and then compounds the damage by intentionally concealing the failure, public confidence in the legal profession is diminished.” *Iowa Sup. Ct. Bd. of Prof. Ethics & Conduct v. Stowers*, 626 N.W.2d 130, 133 (Iowa 2001).

“Fundamental honesty is the base line and mandatory requirement to serve in the legal profession.” *Iowa Supreme Ct. Bd. of Prof’l Ethics and Conduct v. Rylaarsdam*, 636 N.W.2d 90, 93 (Iowa 2001) (quoting *Comm. on Prof’l Ethics and Conduct v. Bauerle*, 460 N.W.2d 452, 453 (Iowa 1990)). “The court system and the public we serve are damaged when our

officers play fast and loose with the truth. The damage occurs without regard to whether misleading conduct is motivated by the client's interest or the lawyer's own." *Bauerle*, at 453.

Aggravating and Mitigating Factors. The Barry Commission considered the mitigating and aggravating factors in Respondent's case: "While weighing the sanctions of *Thompson* and *Rickabaugh*, we must be mindful of the specific facts of this case and the nature of the Respondent's behavior at the time of the violations, at the time of reporting of the violations, and since the reporting of the violations." (Am. App. p. 51) The Commission stated that an eighteen month suspension, with reinstatement subject to completion of consistent, regular mental health therapy with a licensed mental health professional and proof of his fitness to practice law, "while less than the *Rickabaugh* standard ... [is]... justified based on the mitigating factors of community service and the Respondent's depression." (Am. App. p. 57)

Prior discipline. In determining the appropriate discipline, the Commission properly considered Respondent's prior admonition for similar misconduct as an aggravating circumstance. *Taylor*, 887 N.W.2d 369 at 381. (Am. App. p. 56) In 2013, Barry received a prior admonition for neglecting an appeal, contrary to Iowa Rules of Professional Conduct 32:1.3

(lack of diligence) and 32:3.2 (failure to expedite litigation). (Am. App. p. 156; Am. App. p. 162) Barry failed to file an appellate brief and designation of appendix in a marriage dissolution case, and was sent, and received, a notice of default in August, 2012. The notice of default informed Barry that if the appeal was dismissed for failure to comply with the default notice, a copy of the dismissal order would be forwarded to the Board. Nevertheless, Barry failed to cure the default, causing the client's appeal to be dismissed in September, 2012. (Am. App. p. 156; Am. App. p. 162)

As the Commission correctly noted, “[t]his conduct is similar in nature to the actions herein and shows a continued pattern by the Respondent to not complete the work expected by his clients,” and while this Court does “not consider private admonishments to be discipline per se . . . they put attorney’s on notice not to repeat the conduct” and thus constitute an aggravating circumstance. *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Khowassah*, 837 N.W.2d 649, 658 (Iowa 2013) (Am. App. p. 56)

Self-report after discovery of misconduct. This Court, in the *McGinness* case, found that the attorney’s failure to abandon his deception, and to self-report, before being “cornered,” was an aggravating factor. *McGinness*, 844 N.W.2d 456, at 466. Similarly, the Commission in Barry’s

case rejected his contention that he accepted full responsibility for his actions, was remorseful, and that Respondent self-reported his conduct to the Board and that his self-report should be a mitigating factor in determining sanction:

The Respondent did not voluntarily send a letter to the Board. Rather, the Respondent's actions were discovered by the Clay County Clerk of Court's office and reported to the Chief Judge of the Third Judicial District... there is nothing to suggest that Barry was prepared to abandon his course of deception prior to the Clerk of Court and Iowa District Court Chief Judge's contact with Barry's law firm. Barry left the state of Iowa to attend an out of state event, and returned to questions from a lawyer in his firm. In Barry's absence, the law firm had been contacted about the matter by the client, the Clerk of Court's office, and Chief Judge Hoffmeyer. If not for the confrontation from Judge Hoffmeyer through the Respondent's father (one of his law partners), the Commission questions whether the Respondent would have ever reported the same. It appears to the Commission that the Respondent's actions were in response to Judge Hoffmeyer's recommendation to Attorney Rick Barry and that the Respondent did not do so out of remorse or regret of his own actions. Further, the Respondent did not take responsibility for his actions in his letter, rather we find the same was more self-serving than material.

(Am. App. p. 52)

The parties stipulated that Barry acknowledges and accepts responsibility for his misconduct. (Am. App. p. 39; Am. App. pp. 112-114) The fact that an attorney ultimately took responsibility for his or her actions and admitted to violating the ethical rules constitutes a mitigating

circumstance. *Taylor*, 887 N.W. 2d 369, 381 (Iowa 2016). The Commission recognized, while considering sanction, that it found “some mitigation in the Respondent’s willingness to admit fault and enter into a Stipulation” in the matter, preventing the need for a hearing and preventing “the client and his family from having to rehash the details in a court proceeding.” (Am. App. p. 52)

Harm to Client and the Courts. The Commission discussed that Barry’s misconduct, in neglecting the dissolution matter, failing to communicate with, and making false statements to, his client and client’s family, and in forging a dissolution of marriage, had the potential for substantially and adversely affecting the client:

We question what would have happened had the family not pushed for information from the Respondent’s law firm and the Clerk of Court. The deceit about the nature of the client’s legal status as married or single could have impacted the client’s income taxes, inheritance, insurance, etc. Luckily, the client escaped this situation with only emotional distress and delays in his sought outcome. But the client and his family now have limited trust and confidence in the integrity of the legal profession and judicial system. Thus, the injury to the Courts here is substantial.

(Am. App. p. 38; Am. App. pp. 67-69; Am. App. p. 91; Am. App. pp. 107-108; Am. App. pp. 135-136; Am. App. p. 55)

The Commission also found that Barry’s misconduct adversely impacted the client and court system by resulting in significant,

unnecessary, administrative oversight and frustrating expenditure of time and effort by the client, client's family, Clerk of Court's Office, judges, and other judicial staff, searching court records, verifying cases, acquiring information, and in preparing documents reporting Barry's misconduct to others within the judicial and attorney disciplinary systems. "We find that the Respondent's conduct of fraud and deceit is damaging to the integrity and reputation of the legal profession and judicial system as a whole. We feel that such damage can only be repaired with stiff sanctions on the Respondent to deter future behavior and to restore confidence in the public that the judicial system does not condone such behavior." (Am. App. pp. 55-56; Am. App. pp. 64-108)

Depression. The parties stipulated that Respondent has suffered from significant depression. (Am. App. p. 39; Am. App. p. 112; Am. App. p. 141; Am. App. p. 143) Generally, depression can be a mitigating factor in the imposition of discipline. *Thompson*, 732 N.W. 2d 865, 868. In *Thompson*, the Court stated that the "full extent of depression as a mitigating circumstance in the imposition of discipline necessarily relates to the relationship between the unethical conduct and the depression." *Id.* (quoting *Iowa Sup. Ct. Bd. of Prof'l Ethics and Conduct v. Grotewold*, 642 N.W. 2d [288], at 295 [Iowa 2002]).

The Commission found that “Respondent’s depression and treatment have some mitigation but it is not substantial” in determining sanction. (Am. App. p. 53) The Commission did not find, from the information and records provided by Respondent, that Respondent has continued treatment or been provided treatment from a licensed mental health professional. The Committee expressed concerns about the adequacy and benefit of Respondent’s treatment, as since August, 2015, the Respondent had “only attended 7 counseling sessions with Ms. Henry and 7 various retreats,” and especially, “in light of the fact that Respondent has claimed such debilitating depression that caused the actions being addressed herein, plus Respondent has had similar depression issues when disciplined by the Board on a previous occasion.” (Am. App. p. 53)

Community Service. Performing community service, doing volunteer work, or providing pro bono legal services can constitute a mitigating circumstance. *Taylor*, 887 N.W.2d 369, 381 (Iowa 2016) (Am. App. p. 143) The Commission found that Barry, with his family, performed community service, for a period of time, in an orphanage in Haiti. Although the Commission was unsure of the timeframe, the Commission found that this work was a mitigating factor, although “we would note that no information was provided as to the Respondent’s actions once he returned to

the United States and what, if anything, constructive Respondent has done with his time.” (Am. App. p. 54)

CONCLUSION

The Commission concluded, “based on a 4 to 1 vote that Respondent’s license should be suspended for a period of eighteen (18) months, with the dissenting member recommending a one (1) year suspension.” (Am. App. p. 56) Barry’s admissions, together with the admitted Exhibits, establish that Barry knew that his conduct was wrong throughout the entire fourteen month period, yet he persisted. Considering the Commission’s findings regarding Barry’s mental state, the potential for harm, and actual harm, caused to his client, the client’s family, the judicial system and to the reputation of the bar, together with aggravating and mitigating factors, the Board contends that the Commission’s recommendation of an eighteen month suspension of Barry’s license to practice law is an appropriate sanction. Additionally, the Board requests that as a condition of reinstatement, Barry be required to present the Court satisfactory evidence of treatment and fitness to practice law from a licensed mental health professional.

To protect the public, to assure the public and the bar that the

integrity of the profession will be upheld, to deter other lawyers from similar misconduct, and to recognize the nature and pattern of the misconduct and multiple rule violations, the Board respectfully requests the Court, after reviewing this matter *de novo*, to affirm the Commission's findings and conclusions.

IOWA SUPREME COURT
ATTORNEY DISCIPLINARY BOARD

/s/ Susan Wendel
SUSAN WENDEL, AT0008445
Iowa Judicial Branch Building
1111 E. Court Avenue
Des Moines, Iowa 50319-5003
Telephone: (515) 725-8017
Fax: (515) 725-8013
E-mail: susan.wendel@iowacourts.gov

ATTORNEY FOR APPELLEE

CONDITIONAL REQUEST FOR ORAL SUBMISSION

If the Court grants the Appellant oral argument regarding this appeal, the Board requests to be heard in oral argument.

/s/ Susan Wendel
SUSAN WENDEL

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE
REQUIREMENTS AND TYPE-VOLUME LIMITATION**

1. This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this final brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point font and contains 10,049 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Susan Wendel
SUSAN WENDEL

November 22, 2017
DATE

COST CERTIFICATE

The undersigned certifies that the actual cost of printing the foregoing Appellee's Proof Brief was \$0.00.

/s/ Susan Wendel
SUSAN WENDEL, AT0008445
Attorney Disciplinary Board
1111 E. Court Avenue
Des Moines, IA 50319-5003
Telephone: (515) 725-8017
Fax: (515) 725-8013
E-mail:susan.wendel@iowacourts.gov

CERTIFICATE OF FILING AND PROOF OF SERVICE

I certify that on November 22, 2017, I electronically filed the foregoing proof brief with the Clerk of the Supreme Court of Iowa using the

Electronic Data Management System (EDMS). Participants in the case who are registered EDMS users will be served by the EDMS system.

/s/ Susan Wendel

SUSAN WENDEL, AT0008445

Attorney Disciplinary Board

Iowa Judicial Branch Building

1111 E. Court Avenue

Des Moines, IA 50319-5003

Telephone: (515) 725-8017

Fax: (515) 725-8013

E-mail: susan.wendel@iowacourts.gov